

Guidelines for Independent Contractors



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What is an Independent Contractor ?

Defined by law, 39-71-120 and 39-51-201 (15), MCA. A simplified definition is:

- A) one whose work is not controlled by others, and
- B) Is engaged in his or her own trade, occupation, profession, or business.

Whether one is an independent contractor or an employee is a complex issue. The Department of Labor and the Department of Revenue have adopted the same definition to simplify the process of determinations. Wage withholdings, unemployment insurance, workers' compensation, human rights, and wage and hour issues are now decided using the same standards, and by one agency.

Do your Independent Contractors Pass the Test?

As an employer, you must ensure your relationship satisfies all conditions of the "AB" Test. If your relationship with the independent contractor does not meet the conditions of the test, the worker is considered to be your employee.

For more information on independent contractors, contact:
Flathead Job Service Workforce Center
406-758-6200 or
Independent Contractor Unit
406-444-1446

A worker is presumed to be an employee unless he or she demonstrates freedom from control or direction over the performance of services, under the contract and in fact -the "A" test. **Consider the following under the "A" test:**

- Employer does not have control over the details of the work, but merely exercises the necessary control to achieve the ultimate result.
- Employer does not furnish equipment.
- Method of payment. For example, payment by the hour is more indicative of employee status, while lump sum payment is more supportive of an independent contractor relationship.

The employer is exposed to liability for breach of contract if the worker is terminated

A worker must also be engaged in an independently established trade, occupation, profession or business—the "B" test. During an audit, you should provide as much of the following documentation as possible to support the independent contractor status:

- Copy of the written contract between the worker and employer.
- Proof the contractor advertises in the Yellow Pages, or other public directory or advertisement.
- Copy of the contractor's business license or permit.
- Business cards or printed invoices from the independent contractor.
- Insurance certificates.
- Taxpayer identification number.

Evidence (purchase agreements, titles or lease contracts) of the contractor's investment in tools, equipment or specialized knowledge.



Montana Supreme Court Ruling May Surprise Employers Who Hire Independent Contractors

Department of Labor & Industry, May 12, 2003

Independent contractors are perhaps the most misused category of workers in the business world. In today's competitive business climate, many think using independent contractors is a cost-effective way of conducting business. Individuals who sign independent contractor agreements, or who hold Independent Contractor Exemptions, may not be independent contractors in fact. Not withholding taxes and issuing 1099s does not by itself make a worker an independent contractor (IC).

Montana statute defines an independent contractor as "an individual who renders service in the course of an occupation and :

a) has been and will continue to be free from control or direction over the performance of the services, both under contract and in fact; and

b) is engaged in an independently established trade, occupation, profession or business."

A worker must meet **both** sections of the law, (a) and (b), to be an independent contractor.

The law requires individuals who hold themselves out as independent contractors to have workers' compensation insurance on themselves or obtain an Independent Contractor Exemption certificate. A sole proprietor, working member of a partnership or a working member of a member-managed limited liability company may apply for the exemption. Corporate officers are considered employees of the corporation and do not qualify for the exemption, as well as managers of a manager-managed limited liability company.

To sum it up, "if it looks like a duck, walks like a duck, and quacks like a duck, then it must be a duck, even if it is holding a piece of paper that says it is a chicken."

Are you hiring an independent Contractor or an Employee?

When the worker is your employee, you must report his or her payroll to your workers' compensation insurer. The workers' compensation insurer then becomes liable for any work-related injury or occupational disease claims. If someone you thought was an independent contractor is determined to be an employee, your business may be assessed workers' compensation premium on the full amount paid to the contractor, if amounts for labor and materials are not recorded separately.

Independent contractor status, including exemption status, may be evaluated during a premium audit. The State Fund is committed to educate employers to help them understand the independent contractor requirements and the complexities of the workers' compensation system.

How is an Independent Contractor Determination Made?

Mandated by law * Clarified by administrative rule* Defined through court system

The court system has provided us with guidelines in this inquiry. An independent contractor status must be established by a convincing accumulation of evidence. An employee status may be established, however, on the strength of the evidence under one of the four factors standing alone.

The four factors are:

1. Direct evidence of right or exercise of control,
2. Method of payment,
3. Furnishing equipment; and
4. Right to fire.

Sharp v. Hoerner Waldorf Corp (1978)

Independently Established Business

Some questions to ask to determine if an individual is independent are:

- Does the worker have a separate place of business?
- Does the worker have clientele beyond the one contract?
- Does the worker supply most of the equipment and material necessary to do the work?
- Does the worker report to the IRS as a business entity?
- Does the worker pay all the expenses associated with the contract, licenses, insurance travel expenses, etc?
- Can the worker be held liable?



OTHER RESOURCES:

FedWorld Davis– Bacon Database User's Guide

<http://ftp.fedworld.gov/pub/main/davbacn.gde>

Montana Prevailing Wage Rates Little Davis– Bacon

<http://rad.dli.state.mt.us/pw/>

Frequently Asked Questions about the Federal Contractor Program

<http://www.dol.gov/vets/contractor/main.htm>

Office of Federal Contract Compliance Programs

<http://www.dol.gov/esa/ofccp/>

Montana State Fund

Guidelines for Working with Independent Contractors

<http://stfund.state.mt.us/Services/Insurance%20Programs/Independent%20Contractors/guidelines.htm>

For more information, or answers to questions regarding independent contractors status,

please call Independent Contractor Unit at

406-444-1446 or

<http://erd.dli.state.mt.us/WorkCompRegs/WCRHome.htm>

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